FEB 13 1956
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NO. 687

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

WILLIAM ESTEP AND DORA ESTEP, *Petitioners*

VS.

J. E. (BILL) DECKER SHERIFF OF DALLAS COUNTY, TEXAS, *Respondent*

No. 15,602 in the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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William Estep and Dora Estep, husand and wife, herein after called Petitioners, pray that Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review a final judgment, denying them their release upon writ of habeas corpus, dated and entered against them on January 14th, 1956, (R 71), by the

United States Court of Appeals for the Fifth Circuit. Said final judgment of the Court of Appeals, affirmed the Action of the United States District Court for the Northern District of Texas, in which Petitioners were denied their release from confinement for a conviction in the State of Illinois, (R 16-17), which said conviction in the State of Illinois, Petitioners alleged was had in Violation of the Due Process and Equal Protection Clauses of the XIVth Amendment to the Constitution of the United States, (R 1-8), and would show to this Honorable Court:

STATEMENT OF THE CASE

All the evidence introduced in the trial of the case in the United States District Court for the Northern District of Texas, the court of first instance, was stipulated (R 25-31) with the trial court's approval.

William and Dora Estep, husband and wife, were convicted alone in the Criminal Court of Cook County, Illinois, for conspiring to violate certain provisions of the State of Illinois Medical Practice Act, in violation of the Criminal Conspiracy Act, of the State of Illinois, attached hereto and marked Appendix A. That William Estep was sentenced to serve not less than two nor more than Five Years in the State Penitentiary of the State of Illinois, and to pay a fine of Two Thousand Dollars, and that the said Dora Estep was sentenced to serve not less than One nor more than Two Years in the Illinois State Peni-

tentiary, and to pay a fine of $2,000.00. (R. 26-27) (Stip 3).

That Petitioners appealed from this conviction and sentence to the Supreme Court of the State of Illinois, the same being numbered 32,407 on the Docket of that Court (Stip 4, R. 27). The Supreme Court of Illinois transferred the cause to its Appellate Court of the First District of Illinois, which said Court affirmed (*People vs. Estep*, 104 N.E. (2) 562). In due course Appellants applied to *the* Supreme Court of the State of Illinois for writ of error to said Appellate Court of the First District, which was dismissed (Stip 5, R. 27).

From the Judgment of the Supreme Court of Illinois dismissing their Petition for Writ of Error, Petitioners applied to the Supreme Court of the United States for writ of Certiorari, being Numbered 724, October Term, A.D., 1953, which was denied October 12th, 1953, as was their petition for rehearing (Stip 6, R. 27).

Thereupon the Governor of Illinois made requisition for Extradition warrants for Petitioners, and the Governor of Texas issued said extradition warrants June 15, 1954, and Petitioners were apprehended by San Antonio, Texas, authorities (Stip 1, R. 26).

Having been denied a writ of habeas Corpus by the Criminal District Court of Bexar County, Texas, contesting the validity of the Governor's warrant of Extradition, they appealed to the Court of Criminal Appeals of the

State of Texas, which said Court affirmed the action of the Criminal District Court of Bexar County, Texas, and denied motion for rehearing. (276 S.W. (2) 284, 285)

They exhausted all their state remedies, and being incarcerated in the Dallas County, Texas, jail in the custody of the Honorable J. E. (Bill) Decker, Sheriff of Dallas County, Texas, Petitioners applied to the Honorable William H. Atwell, United States District Judge for the Northern District of Texas, for writ of habeas corpus (R. 1-9). On the 25th Day of March, 1955, Judge Atwell granted the writ of habeas corpus and ordered Respondent to produce the persons of Petitioners before him, in his court rooms on April 8th, 1955, at 10:00 o'clock A.M., and show cause why he was holding them in restraint of their liberties (R. 9).

On the date set, Respondent produced Petitioners as directed, and his able Counsel, Hon. Henry Wade, District Attorney for Dallas County, Texas, and his able Assistants, Hon. Julien C. Hyer and Hon. John R. Webster, filed their Answer (R. 10-16).

The case was called for trial April 8th, 1955, and all parties announced ready. The facts considered pertinent by both sides were stipulated (R. 25-33). Upon conclusion of the hearing, Judge Atwell entered his order dismissing the Writ (R. 16-17), and wrote an opinion, Ex Parte, Estep 129 Fed. Sup. 559, attached as Exhibit C.

On April 12th, 1955. Appellants duly filed their Notice of Appeal (R. 17-19). That on April 11, 1955, Petitioners filed their petition to the Honorable William H. Atwell, United States District Judge, for certificate of probable cause that they might appeal, (R. 20-22), and on the same day the trial court issued same (R. 22), and they did in due course, perfect their appeal.

On December 21st, 1955, the United States Court of Appeals for the Fifth Circuit affirmed the action of the court below (R. 54), and wrote an opinion (R. 50-53).

On January 9th, 1956, Petitioners seasonably filed their petition for rehearing, (R. 55-67), which was denied on January 14th, 1956 (R. 71), without written opinion. Thereupon, Petitioners on the 19th Day of January, 1956, filed their petition for stay of mandate for a period of thirty days from the date of the overruling of their petition (R. 72-73), for rehearing, which was, on the 19th Day of January, 1956, overruled and denied (R. 73).

JURISDICTION

Jurisdiction of this Honorable Court is sought under and by virtue of Section 1254 (1) Title 28, United States Code, Annotated. Petitioners, being husband and wife, were convicted alone in the Criminal Court of Cook County, Illinois, for having conspired to violate certain provisions of the State of Illinois Medical Practice Act Appendix A and (R. 26 and 29-31). They exhausted their State

Remedies (R. 25-29), and applied to Hon. Wm. H. Atwell, United States District Judge for the Northern District of Texas, for writ of Habeas Corpus, seeking their release from Hon. J. E. (Bill) Decker, Sheriff of Dallas County, Texas, who was holding Petitioners for the State of Illinois, by virtue of said conviction of conspiracy, in that the State of Illinois was governed by the Common Law (Appendix B), and a conviction of husband and wife alone for conspiracy constituted a void judgment, and its enforcement was violative of the Due Process and Equal Protection Clauses of the XIVth Amendment to the Constitution of the United States (R. 1-8). Judge Atwell denied the relief sought (R. 16-17), but issued his order of Probable Cause, allowing Petitioners to appeal to the United States Court of Appeals for the Fifth Circuit (R. 22). Whereupon, Petitioners seasonably appealed, and on December 21st, 1955, the Court of Appeals affirmed the judgment of the Court below (R. 54), and wrote an opinion (R. 50-53). January 9th, 1956, Petitioners filed their Petition for rehearing (R. 55-70). Rehearing was denied January 14th, 1956 (R. 71) without written opinion. On January 19th, 1956, Petitioners petitioned the United States Court of Appeals for the Fifth Circuit for stay of mandate for thirty days from January 14th, 1956, within which they might apply to this Honorable Court for Writ of Certiorari (R. 72-73), which was, on January 19th, 1956, denied (R. 73).

REASONS URGED WHY WRIT SHOULD BE GRANTED

1. In affirming the action of the trial court in holding that a husband and wife alone may be convicted for conspiring with each other to commit a crime, the United States Court of Appeals for the Fifth Circuit rendered a decision in conflict with decisions of other courts of appeal on the same matter, and particularly in conflict with the decision of the 9th Circuit in the cases of *Dawson Vs. United States*, 10 Fed. (2), 106, and *Gros Vs. United States*, 138 Fed. (2) 261.

2. In affirming the action of the trial court, holding that a husband and wife may alone be convicted for a conspiracy alleged to have been committed in Illinois, governed by the Common Law (Appendix B), and that "I think it will be a long reach for this court, under the stipulations which have been made, to order these applicants released. I, therefore, deny the writ of habeas corpus." (Appendix C), the United States Court of Appeals for the Fifth Circuit decided a federal question in conflict with applicable decisions of this Honorable Court, and particularly in conflict with the decision in *Brown Vs. State of Mississippi*, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682.

3. In holding that under the common law a husband and wife alone may be convicted for conspiring with each other to commit an offense the United States Court of

Appeals for the Fifth Circuit decided an important question of Federal Law, which has not been directly, but should be, settled by this Honorable Court.

4. In holding that a husband and wife may be convicted for conspiring with each other to commit an offense in a state governed by the Common Law (Appendix B), the United States Court of Appeals for the Fifth Circuit violated a fundamental tradition of our government, older than the Constitution itself, and holding that "progressive emancipation" might destroy the Common Law, constituted an undue infringement upon the legislative authorities, and, thereby, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

QUESTIONS PRESENTED FOR REVIEW

1. May a husband and wife alone conspire with each other to commit a crime in a state (Illinois) governed by the Common Law?

2. In a Common Law State (Illinois), where others are charged with them, by names, and still others to the grand jurors unknown, where there is no evidence of the "unknown, conspirators" participation in the crime, and where all other conspirators named in the indictment were acquitted prior to the time the case went to the jury, may a husband and wife alone be convicted of the conspiracy

charged, and if not, would confinement of husband and wife in the penitentiary upon such conviction be a denial of the Due Process and Equal Protection clauses of the XIVth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of XIVth Amendment to the Constitution of the United States Involved in this cause are:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

1. The Conspiracy Statute of the State of Illinois, under which Petitioners were convicted and sentenced is brought forward as Exhibit A, attached to this Petition.

2. The Legislative Act of the State of Illinois adopting the Common Law is brought forward as Exhibit B, attached to this Petition.

STATEMENT OF FACTS IN CASE BELIEVED MATERIAL TO CONSIDERATION OF QUESTIONS PRESENTED

As above set out, all evidence in the case was stipulated (R. 25-30). It was stipulated (Stipulation 8, R. 28) that the conviction in the State of Illinois "* * * was for conspiring among themselves, man and wife, * * *." At the suggestion of one of Counsel for Respondent, it was further stipulated that others were named in the indictment. (R. 29-30). But it was also stipulated that all named in the indictment other than Petitioners were dismissed out of the indictment (R. 30). It is also shown by the stipulation that Petitioners exhausted all their State Remedies before applying to the United States District Court for the Northern District of Texas for writ of habeas corpus (R. 25-33). As a matter of Fact, Judge Atwell so held in his written opinion (Appendix C).

JURISDICTION OF THE COURT OF FIRST INSTANSTANCE

Petitioners were finally convicted, alone, being husband and wife, for violating the State of Illinois conspiracy statute (Appendix A). They exhausted their State Remedies (R. 25-31), and on having been incarcerated in the Dallas County, Texas, Jail by the Sheriff, J. E. (Bill) Decker, which said Dallas County, Texas, is a part and component of the United States District Court for the Northern District of Texas, they applied to Hon. Wm.

H. Atwell, United States District Judge for the Northern District of Texas, alleging, under oath, that their conviction in the State of Illinois and the enforcement of the penalty assessed was in violation of the Due Process and Equal Protection clauses of the XIVth Amendment to the Constitution of the United States.

AMPLIFICATIONS OF REASONS FOR WRIT

Petitioners wish to earnestly call to this Honorable Court's attention to the provisions of the Act of the Legislature of Illinois in adopting the Common Law (Appendix B) which specifically provide: "* * * shall be the rule of decision, and shall be considered as of full force *until repealed by legislative authority.*"

Illinois is still a "Common Law" State. Illinois adopted the comon law by Acts of its Legislature, March 5th, 1874, R.S. 1874, P 269, now Chapter 28 of the Statutes of Illinois, text of which is hereto attached and brought forward as Appendix B. Petitioners urge, after an exhaustive search, that no legislative enactment has been passed by the Illinois Legislature repealing this statute of adoption of the common law, and is, therefore, still the law there, and was at the time of the indictment and conviction of Petitioners. They urge that it is significant that the Conspiracy Statute, under which they were convicted (Appendix A), was passed by the same Legislature that adopted the Common Law (Appendix B), just 22 days

subsequent, and made mention (in Appendix A) and took cognizance of "Conspiracy at Common Law."

The United States Adopted the Common Law by Act of Congress, February 27, 1801, 2 Stat., 103, although Judge Call, United States District Judge for the Southern District of Florida, in refusing to sustain a demurrer to an indictment charging conspiracy of husband and wife alone (*United States Vs. Henson, et Ux*, 3 Fed. 2nd, Page 200) stated the United States had no common law. But he ruled:

> "At common law it is probable that the plea of coverture would state a cause of abatement, on account of the unity of husband and wife; the husband being the responsible party for joint crimes committed by husband and wife. And this rule would prevail in states adopting the common law and having made no change by statute. As I understand it, there is no common law prevailing in the United States, and since the adoption o fthe Nineteenth Amendment to the Constitution, it seems to me that the rule of common law has no application to crimes committed against the United States.
>
> "The demurrer to the said plea will therefore be sustained."

Therefore, strongly intimating had he known of the adoption of the Common Law by Congress he would have sustained the demurrer.

In *United States Vs. Shaddix et Ux*, 43 Federal Supplement, Page 220, by Judge Mize, Southern District of Mississippi, it is held:

"The question presented in this case is whether or not a husband and wife can commit the crime of conspiracy to violate the National Bankruptcy Act, 11 U.S. C A. § 1 et seq. It arises by virtue of a demurrer filed by the defendants, who are husband and wife, to an indictment in one count charging them with conspiracy to violate the National Bankruptcy Act. There is no third defendant named in the indictment, but it presents the sole question as to whether or not the crime of consppiracy can be committed solely by the husband and wife.

"The question is one of first impression in this circuit, but it has been decided in the ninth circuit in the case of Dawson et al. v. United States, 9 Cir., 10 Fd 2d 106. That circuit follows the common law rule laid down concisely in 12 C. J. 543, wherein it is stated: "It has been uniformly held that as husband and wife are considered one in law, they cannot be guilty of conspiracy." 15 C.J.S., Conspiracy, § 37. Bishop on Criminal Law, 2nd Ed., Sec. 187, states the rule as follows: "Husband and wife being regarded in the law as one person, cannot without other combination commit this offense. But when there is another conspirator, a wife may be joined with her husband in the indictment."

"As stated by the Dawson case, that language of the textwriter is followed by many courts. I find no authority to the contrary of the above holding. If other co-conspirators had been joined in the indictment, then, of course, the mere fact that the husband and wife appeared also would not make the indictment faulty, but when the only material allegations of the indictment with sufficient clarity show that a conspiracy is alleged to have been formed by the husband

and wife and the overt acts committed by one or the other, then the indictment is insufficient. The indictment in this case shows that the alleged conspiracy is claimed to have been formed by and between the husband and wife.

"The demurrer, therefor, will be sustained."

Of course, Petitioners take notice of the opinion of Judge Mize that where others appeared in the indictment a demurrer would not lie. We agree with the Judge that on the face of the indictment, with no proof offered, it would be good. But our case is difefrent, as will be more fully hereinafter set out and argued, the case was tried, all other parties dismissed out of the case prior to the time it went to the jury, and only husband and wife were convicted (Stipulation 8, R. 28, and further stipulations R. 29, beginning at bottom of page by Mr. Hyer. Our contention is that, under the common law, a conspiracy court went to the jury against one person. That there must be two or more is so patent Petitioners will not impose on the intelligence of this Honorable Court by citing authorities.

In *Dawson Vs. United States*, 10 Fed. 2nd, page 107, a husband and wife were indicted and convicted for a conspiracy to violate the white salve act, and several substantive counts of such violation, and appealed, and we here quote fully from said opinion, because we believe it supports our contention.

"The defendants testified that on the 24th of December, 1918, they entered into a written contract of

marriage in the presence of Wm. L. McConnell, a notary of justice of the peace at Idaho Falls; also that since that date they have held themselves out as man and wife. Based upon this testimony, defendants requested the trial court to give the following instruction:

"That if you find from the evidence that the defendants were man and wife during the period covered by the first count or charge in the indictment, and the evidence herein, you should find both defendants not guilty on that count. The charge is one of conspiracy to commit crime, and it is not legally possible for a wife so to conspire with her husband, nor a husband with his wife."

In 12 C. J. 543, it is said:

"It has been uniformly held that, as husband and wife are considered one in law, they cannot be guilty of a conspiracy." In 2 Bishop on Criminal Law (9th Ed.) § 187, the law is thus stated: "Husband and wife, being regarded in the law as one person, cannot without other combination commit this offense. But, where there is another conspirator, a wife may be joined with her husband in the indictment." The same rule is announced in a note in 4 A. L. R. 282.

The language of these text writers is supported by the following decisions: People v. Miller, 82 Cal. 107, 22 P. 934; Merrill v. Marshall, 113 Ill. App. 447, 456; Worthy v. Birk, 224 Ill. App. 574, 583; Commonwealth v. Allen, 24 P. Co. Ct. R. 65, 66; State v. Clark, 9 Houst. (Del.) 536, 540, 33 A. 310. The law is held to be otherwise in Smith v. State, 48 Tex. Cr. R. 233, 89 S. W. 817, 820, 821, and Dalton v. People, 68 Colo. 44, 189 P. 37.

> "The common-law rule unquestionably supports defendants' contention; a rule so well established and so generally recognized by the modern authorities should not be judicially repealed. We think the requested instruction should have been given. The government relies on Wilson v. U. S., 232 U .S. 563, 34 S. Ct. 347, 58 L. Ed. 128. This was not a conspiracy case. The court affirmed the conviction of a man and wife charged with violation of the White Slave Act."

In *Johnson Vs. United States*, 157 Fed. 2nd, 209 (D.C.) the Court affirmed a conviction of husband and wife, for conspiracy because, it said, Congress had passed legislation repealing the common law in the District of Columbia, leaving the inference, as we interpret it, had not the common law been repealed, the case would have ben reversed.

After the conviction of Petitioners, as set out in Stipulations (R. 26-30), in the Criminal Court of Cook County, Illinois, Petitioners appealed directly to the Supreme Court of Illinois (*People Vs. Estep*, 97 N.E. 2nd, 823) on the ground the conspiracy statute of the State of Illinois (Appendix A) was unconstitutional. No mention of the inability of husband and wife to conspire was urged. The Supreme Court of Illinois held there was no constitutional question raised, and held it had no jurisdiction on cases appealed direct from the trial court, unless a constitutional question was involved and properly raised, and transferred it to the Appellate Court for the First District and Division of the State of Illinois. This court affirmed the case, holding a husband and wife might be con-

victed for conspiracy alone, for the first time (*People Vs. Estep*, 104 N.E. 2nd, 562). The Supreme Court of Illinois has never passed upon the question raised by Petitioners that they may not be convicted of conspiring to commit an offense, where no others were convicted with them.

They made application for writ of error in the Supreme Court of Illinois from the judgment of the Appellate Court affirming their conviction, but no opinion was rendered by the Supreme Court, but the petition was dismissed, the reasons for such action is not in the record (Stip 5, R. 27).

It is true that the Supreme Court of Illinois in *People Vs. Martin*, 122 N.E. 2nd., 245 held that a husband and wife may be convicted of a conspiracy. But in that opinion, the Court did not say that any legislation had ever been enacted by the Legislature of the State directly repealing the provisions of the common law early adopted by that State (Appendix B), but argued that "women had been liberated" so as to destroy the precepts of the common law. We earnestly urge this doctrine is against the great weight of the authorities herein cited, contrary to the public interest, and not binding on this Court. No opinion of a high state court construing its statutes is binding on this Court when such an opinion results in the denial of Due Process as guaranteed by the XIVth Amendment to the Constitution of the United States.

In *Gros Vs United States*, 138 Fed 2nd, Page 261, Appellants urge they have an authority directly in point with

theirs. Not only that a husband and wife may not conspire with each other to commit an offense, but that "disproved charges against a third party" who may have been joined in the indictment with a husband and wife still leaves only husband and wife as conspirators.

In that case, it appears that Gros and wife, with another, were charged with conspiracy to violate the Espionage Act. Only Gros and his wife were convicted, and in reversing the case, Circuit Judge Matthews dissenting, the Court held:

> "It now appears that the statements of Mrs. Gros' confession and the testimony relevant to her participancy in the charged conspiracy with Dr. Gros, set forth in our opinion reported supra, were of a date subsequent to her marriage to him. They do not show the existence of the conspiracy prior to the marriage. We have held that a husband and wife are incapable of engaging in a criminal conspiracy. Dawson v. United States, 9 Cir., 10 F. 2d 106, 107.
>
> "The acquittal of a third party charged with participancy in the conspiracy leaves but these two, whose incapacity is not removed by a disproved charge against the third party. Worthington v. United States, 7 Cir., 64 F. 2d 936, 939; Turinetti v. United States, 8 Cir., 2 F. 2d 15, 17. Cf. People v. MacMullen, 134 Cal. App. 81, 24 P. 2d 794.
>
> The judgment is reversed.
>
> MATHEWS, Circuit Judge, dissents."

CONCLUSION

For the above and foregoing reasons, Petitioners Earnestly urge this Honorable Court to grant and issue Writ of Certiorari to the United States Court of Appeals, for the Fifth Circuit to the end that this case may be reviewed by this Honorable Court, and that such other and further orders be had this Honorable Court may deem necessary, just and proper.

.....

Louis W. Woosley,
Davis Building, Dallas, Texas,
Counsel for Petitioner.

.....

Howard Dailey, Davis Building, Dallas,
Texas, of Counsel

I, Louis W. Woosley, Counsel for Petitioners, Certify that I have on this the ..... Day of February, A.D., 1956 delivered two copies of this Petition for Certiorari to Hon. John J. Fagan, Counsel for Respondent, J. E. (Bill) Decker, in person.

.....

Counsel for Petitioners

APPENDIX A

CHAPTER 38—CRIMINAL CODE

Conspiracy

Act of March 27, 1874, resumed

138. To indict.—§ 45. If any two or more persons shall conspire or agree, falsely and maliciously, to charge or indict, or cause or procure to be charged or indicted any person for any criminal offense, each of the persons so offending shall be fined not exceeding $1,000, and confined in the county jail not exceeding one year.

139 To do an illegal act—Boycott—Black list—§ 46. If any two or more persons conspire or agree together, or the officers or executive committee of any society or organization or corporation, shall issue or utter any circular or edict, as the action of or instruction to its members, or any other persons, societies, organizations, or corporations, for the purpose of establishing a so-called boycott or black list, or shall post or distribute any written or printed notice in any place, with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business, or employment, or property of another, or to obtain money or other property by false pretenses, or to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice or to prevent competition in the letting of any contract by the State, or the authorities of any counties, city, town or vil-

lage, or to induce any person not to enter into such competition, or to commit any felony, they shall be deemed guilty of a conspiracy; and every such offender, whether as individuals or as the officers of any society or organization, and every person convicted of conspiracy at common law, shall be fined not exceeding $2,000 or shall be imprisoned in the county jail not exceeding one year, or shall be imprisoned in the penitentiary for a term of not less than one year and not exceeding five years, or may be so fined and so imprisoned in the county jail or penitentiary.

Associations, corporate or otherwise, of farmers, gardeners or dairymen, including livestock farmers and fruit growers, engaged in making collective sales or marketing for its members or shareholders of farm, orchard or dairy products, produced by its members of shareholders are not conspiracies. Contracts, agreements, arrangement or combinations made by such associations or the members, officers or directors thereof in making such collective sales and marketing and prescribing the terms and conditions thereof are not conspiracies and they shall not be construed to be injurious to the public trade. As amended by act approved July 8, 1947. L. 1947, p. 799.

Validity. P. v. Horwitz, 362--289, 199 N.E. 788.

AN ACT to define and punish conspiracies in the State of Illinois. [Approved April 19, 1877. L. 1877, p. 92]

APPENDIX B

CHAPTER 28—COMMON LAW

Act of March 5, 1874

AT ACT to revise the law in relation to the comon law. [Approved March 5, 1874. R. S. 1874, p. 269.]

1. Rules of decision.—§ 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*: That the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, excepting the second section of the sixth chapter of 43d Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37th Henry Eighth, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.

The "fourth year of James the First" referred to in this section, covered the period beginning March 24, 1606 and ending March 23, 1607.

For text of the "second section of the sixth chapter of 43d Elizabeth, the eight chapter of 13th Elizabeth, and ninth chapter of 37th Henry eight" excepted from the operation of this section, see Historical Note in Smith-Hurd Illinois Annotated Statutes under Ch. 28, Common Law, § 1.

APPENDIX C

EX PARTE WILLIAM ESTEP AND DORA ESTEP

Civ. A. No. 5945

United States District Court, N.D. Texas, Dallas Division
April 8, 1955

Proceeding on application for writs of habeas corpus by husband and wife who were held, respectively, in custody of United States Marshal and of Texas Sheriff and for whom extradition had been sought by governor of Illinois. The District Court, Atwell, J., held that fact that others indicted with husband and wife for conspiracy had been dismissed from indictment did not, in view of the emancipated status of married women, vitiate convictions of husband and wife for conspiracy or entitle them to release from restraint under such convictions in Illinois, Texas and federal courts.

Writs denied.

CONSPIRACY - 23 — HABEAS CORPUS - 29

That others indicted with husband and wife for conspiracy had been dismissed from indictment did not, in view of the emancipated status of married women, vitiate convictions of husband and wife for conspiracy or entitle them to release from restraint under such convictions in Illinois, Texas and federal courts.

Henry Wade, Dist. Atty., Dallas, Texas., Julien C. Hyer and John Webster, Asst. Dist. Attys., Dallas, Tex., for respondents.

Lester L. May and Howard Dailey, Dallas, Tex., for relators.

ATWELL, District Judge.

The relators are husband and wife, and extradition has been sought by the governor of the state of Illinois, through the governor of the state of Texas, such application having been made in the regular constitutional manner.

One of the applicants is in the hands of the United States Marshal for this district for an alleged federal offense, for which he has been convicted and the conviction is on appeal to the Fifth Circuit Court of Appeals. The other is in the hands of the Sheriff of Dallas County for an alleged state offense, each of whom has been charged separately and jointly in different venues of the state of Texas.

I find the facts to be as stipulated by the attorneys in open court, and, summarily, they are, that the alleged illegal transactions took place first in Illinois, and then after their flight from Illinois, where each of them was convicted, and from those convictions each of the applicants sought relief from the courts of the state of Illinois, and having been refused there to the Supreme Court of the United States, all of which courts refused relief.

After their flight into Texas they were arrested for various offenses and have appealed from convictions in the trial court and have gone to the court of the last resort,

with the exception of appeal to the United States Supreme Court. These Texas convictions have been in both the state court and the federal court, as above indicated.

They seek release alleging illegal restraint. Such alleged illegality is based on the proposition that the husband and wife cannot be convicted for conspiring together, and in support of such contention the common law is cited, and some respectable decisions in this county of later years.

The convictions in the state of Illinois were for having conspired with others, which others were ultimately and finally dismissed from the case, or, rather, from the indictment, and the husband and wife were convicted. The Texas convictions in both state and federal court were also for conspiring together.

I am not at all convinced that the failure to prosecute the third party, or, parties, with whom the husband and wife are alleged to have conspired, means that those who were dismissed were not also guilty, but, the evidence and the proof seems to be insufficient to prove such guilt. The prosecuting officers could have dismissed under situations of that sort and still have left the husband and wife in the case as conspirators.

Furthermore, using the common law as the basis for reasoning, is like building a house upon the sands instead of upon the rock. The wife is no longer hidden in the personality of the husband in America. She has her separate

property; she has a part in the community property; she has the right to vote; in many states she is compelled to serve as a juror; she is a legislator in state and nation; she is a practitioner of law; doctor, judge, preacher, merchant, and, in many instances, in the Armed Forces. There is every evidence of complete emancipation for the wife in America. The judge would be bold indeed who would hold, in the face of such evidence and fair emancipation, that there can be no unlawful agreeing among themselves.

There are interesting decisions which may be considered by the student, and which have been cited in argument. They are : Brown v. State of Mississippi. 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682; Dawson v. United States, 9 Cir., 10 F. 2d 106; Gros v. United States, 9 Cir., 138 F. 2d 261; People v. Estep, 346 Ill. App. 132, 104 N.E. 2d 562 (which is an opinion as to these two applicants and is quite appropriate here) ; People v. Marton, 4 Ill. 2d 105, 122 N.E. 2d 245. It will be noted that neither of these cases deals with the complete emancipation of the wife, as suggested by myself.

I think it will be a long reach for this court, under the stipulations which have been made, to order these applicants release. I, therefore, deny the writs of habeas corpus.

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15602

WILLIAM ESTEP and DORA ESTEP,

Appellants,

versus

J. E. (Bill) DECKER, SHERIFF OF DALLAS COUNTY, TEXAS,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(December 21, 1955.)

Before HUTCHESON, Chief Judge, and HOLMES and RIVES, Circuit Judges.

RIVES, Circuit Judge: Appellants, husband and wife, were alone convicted in an Illinois state court, under that State's Criminal Conspiracy Act, for conspiring to violate certain provisions of the Illinois Medical Practice Act, and both were fined and received penitentiary sentences.

Their convictions were affirmed by an Illinois appellate court in *People v. Estep*, 346 Ill. App. 132, 104 N.E. 2d. 562. They subsequently exhausted their state remedies by petitions for review of that decision in the Supreme Court of Illinois and the Supreme Court of the United States, but the former tribunal dismissed their writ of error and the Supreme Court denied certiorari. See 413 Ill. 437, 109 N.E. 2d. 762; 345 U.S. 970, 346 U.S. 842.

Appellants having left the jurisdiction of Illinois for Texas while their case was pending on appeal before the Supreme Court, the Governor of Illinois requested their extradition and return for service of sentences, but appellants contested the validity of their Illinois convictions and resulting extradition via habeas corpus proceedings in the Texas courts and the district court below. See ex Parte Estep, 276 S.W. 2d. 284; 129 F. Supp. 557.[1] In the instant proceeding, they sought release from their restraint by appellee, who is detaining them for further transfer to Illinois under warrants for their extradition. The district court refused to grant a writ, but issued a certificate of probable cause to authorize their present appeal.

In substance, appellants' insistence in brief and oral argument is that, Illinois having by statute expressly

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1 It was further stipulated below that William Estep was also convicted of a felony in the Federal District Court for the Northern District of Texas, Abilene Division, on April 16, 1954, for which he received a five year penitentiary sentence and a $2,000.00 fine, though his appeal from that conviction to this Court is still pending. At the time of hearing, William Estep had also posted bond on a Tarrant County, Texas charge for violating that State's Medical Practices Act, and both he and his wife had been granted bail on a similar charge made against them in Dallas County, Texas, for practicing medicine without a license.

adopted the common law, and absent any legislative repeal or qualification of that adoption here material, the courts of that State were, in effect, bound by "due process" to adhere to the rule of those decisions based upon the old common law unity of husband and wife, and holding them legally incapable of conspiring together or suffering a valid conviction therefor.[2] They further insist that their Illinois convictions did not afford them due process simply because other parties were charged jointly with them in the indictment, especially since these other indictees were admittedly acquitted before the case was submitted to the jury, and they were the sole parties to the alleged conspiracy convicted.[3] Reasoning thus, they urge finally that their Illinois convictions are invalid as lacking in due process under the Fourteenth Amendment, and therefore are not binding upon this Court.

Appellee takes the position that, since the Illinois indictment upon which appellants' convictions are based charged them with conspiring with certain named persons "and with divers other persons whose names are unknown to the grand jurors", the rule of those authorities upon which appellants here rely is neither applicable nor controlling in their favor, as indeed the Illinois decision affirming their convictions expressly recognizes. See *People v. Estep, supra.* Alternatively, appellee insists that the

2 See Dawson v. United States, 9th Cir., 10 F. 2d. 106; Gros v. United States, 9th Cir., 138 F. 2d. 261; United States v. Shaddix, S.D. Miss., 43 F. Supp. 330; Cf. Ansley v. United States, 5th Cir., 135 F. 2d. 207, 208.

3 Relying principally upon Gros v. United States, supra note 2, wherein the Ninth Circuit stated that "The acquittal of a third party charged with participancy in the conspiracy leaves but these two, whose incapacity is not removed by a disproved charge against the third party", citing authorities. 138 F. 2d. at p. 263.

wife's complete emancipation in this more enlightened era logically compels rejection of the old common law fiction of unity of the husband and wife, as recognized in Texas and elsewhere. See *Marks v. State*, 164 S.W. 2d. 690; *Johnson v. United States*, DCC, 157 F. 2d. 209.

We think it inappropriate upon this review for us independently to re-examine the contentions urged, for irrespective of anything we might be disposed to add in support of the present trend toward judicial recognition of the wife's legal emancipation from the husband,[4] we think decision here must turn upon the broad proposition that the Illinois affirmance of appellants' convictions in *People v. Estep, supra*, is not so lacking in due process as would justify any holding upon this collateral attack that it was in violation of the Fourteenth Amendment, or failure to accord that decision binding force and effect. See *West v. Louisiana*, 194 U.S. 258, 262-263; *Paterno v. Lyons*, 334 U.S. 314, 318-319; *Stein v. New York*, 346 U.S. 156, 196-197.

AFFIRMED.

4 As typified by this Circuit's recent expressions in Thompson v. United States, m/s, slip opinion dated November 18, 1955.

A True Copy:
Teste:

JOHN A. FEEHAN, JR., Clerk
By.....
Clara R. James
Clerk of the United States Court of
Appeals for the Fifth Circuit.